STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS. - NORTH JUNE TERM, 2007

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

NO. 07-S-0254

**MOTION TO BAR THE DEATH PENALTY (No. 2)
BECAUSE NEW HAMPSHIRE'S CAPITAL SENTENCING STATUTE DOES NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DESERVES THE DEATH PENALTY**

The Accused, Michael Addison, and his Public Defenders respectfully request that the Court enter an order barring the death penalty in this case.

INTRODUCTION

1. Burdens of proof reflect our values. When the government seeks to take a person's life or liberty, our constitution imposes a burden of proof on the government. When the consequences are severe and the risk of error is serious, the New Hampshire Constitution requires greater proof that the government action is justified. The burden of proof reflects how much we value the right being threatened and our concern about the risk of erroneously taking away that right.

2. As a civilized society governed by laws, there is no more important decision than whether we will deliberately kill another human being. There is no right more valuable than the right to life. There is no risk of error greater than the risk of wrongly executing someone.

3. Our death penalty statute is flawed. The statute does not require that the government carry a heavy burden of proof to show that a death eligible defendant should be put to death. This flaw violates the due process requirements of the New Hampshire Constitution.

4. Under the New Hampshire death penalty statute, the government must show that a person is eligible for the death penalty by proving beyond a reasonable doubt that he committed a capital crime and that aggravating factors are present. However, once the person is shown to be eligible, our statute simply instructs the jury to decide whether to impose the death penalty by considering whether aggravating factors "outweigh" mitigating factors. The statute does not require jurors to find that aggravating factors outweigh mitigating factors beyond a reasonable doubt. The statute does not require that jurors find that the defendant deserves the death penalty beyond a reasonable doubt.

5. The most important decision made in our courts should not be governed by the lowest standard of proof. Requiring that aggravating factors simply "outweigh" mitigating factors is not enough under our constitution. The law should not allow the death penalty if the defendant "probably" deserves it. The law should not allow the death penalty when there are reasonable doubts about whether it should be imposed. The New Hampshire Constitution demands greater respect for human life. For these reasons, the court should bar imposition of the death penalty.

FACTS AND PROCEDURAL CONTEXT

6. Michael Addison is charged with capital murder. The State has filed a Notice of Intent to Seek the death penalty.

7. New Hampshire's current capital sentencing procedure has never been reviewed by the New Hampshire Supreme Court or any other appellate court.

8. As set forth below, New Hampshire's current capital sentencing scheme is invalid "on its face" in all capital cases because it violates the New Hampshire Constitution.

THE CAPITAL SENTENCING STATUTE

9. New Hampshire's capital sentencing statute, RSA 630:5(IV), provides in part:

> The jury shall consider all the information received during the hearing. . . . If an aggravating factor set forth in subparagraph VII(a) and one or more of the aggravating factors set forth in subparagraph VII(b)-(j) are found to exist, the jury **shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death.** Based upon this consideration, if the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury, by unanimous vote only, may recommend that a sentence of death be imposed rather than a sentence of life imprisonment without possibility of parole. The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed. (Emphasis added.)

10. Thus, once the jurors determine that a defendant is eligible for the death penalty -- that aggravating factors from subparagraphs VII(a) and VII(b)-(j) have been proved beyond a reasonable doubt -- the jury is then left to "consider" whether those aggravating factors (and any non-statutory aggravating factors) "outweigh" any mitigating factors.

11. The statute provides specific guidance in the form of two classes of aggravators and a high burden of proof for determining death eligibility. Jurors must unanimously agree that aggravating factors from each of two categories have been proved beyond a reasonable doubt.

12. However, the statute then fails to provide similar guidance for the remaining and most important decision: whether to impose a life sentence or the death penalty.

13. The statute instructs jurors to "weigh" the aggravating and mitigating factors but does not specify a standard for that weighing process. Although the statute speaks of "sufficient"

justification and aggravators "sufficiently" outweighing mitigators, no guidance is provided regarding what is "sufficient." The statute does not say to what extent aggravating factors must "outweigh" mitigating factors before the death penalty may be imposed. If the aggravating and mitigating factors are evenly balanced except for one slight point weighing in favor of the aggravating factors, the statute permits imposition of the death penalty.

14. The statute does not require that jurors be convinced to a high level of certainty that the defendant should be put to death. Specifically, the statute fails to state that the death penalty may only be imposed when the jury finds beyond a reasonable doubt that the death penalty, rather than life is prison without the possibility of release, should be imposed.

OUR STATUTE IS COPIED FROM A FEDERAL STATUTE

15. Examination of the New Hampshire capital sentencing statute and its apparent federal source demonstrates that the Attorney General proposed and the legislature adopted a statute which was only intended to comply with the minimal federal standards for capital sentencing.

16. In 1990, while State v. Johnson, 134 N.H. 570 (1991) was pending, the New Hampshire Legislature substantially rewrote the capital sentencing statute. House Bill 1157-FN, a bill adding new sections to the statute defining capital murder, was amended to add changes to the law setting forth capital sentencing procedure, RSA 630:5. According to the committee report which proposed the changes, the amendment was "basically requested by the Attorney General's Office. It is a procedural section, which it feels better defines the procedures used in capital murder trials." See New Hampshire House Journal, February 14,

1990, p. 691-698. The bill containing these amendments was ultimately passed and became the current version of RSA 630:5.

17. The procedures in the 1990 law appear to have been copied directly from death penalty procedures in federal statutory law intended to apply in federal drug cases. That federal law has since been repealed and subsumed into a more general federal capital sentencing statute. Specifically, New Hampshire's capital sentencing statute is, with only a few exceptions, exactly the same as the federal capital sentencing procedure which was previously found in the federal drug laws at 21 U.S.C. 848(e)-(n). (That federal statute was originally passed as part of the United States Congress's "Anti-Drug Abuse Act of 1988. The capital sentencing procedures were removed from 21 U.S.C. 848 on March 9, 2006 by the "US Patriot Improvement and Reauthorization Act of 2005, Public Law 109-177. Federal sentencing in capital cases is now governed by 18 U.S.C. 3591 et seq.)

18. The federal statute was an attempt by the U.S. Congress to incorporate United States Supreme Court death penalty jurisprudence and philosophy into a federal statute. Congress's goal was to insure that the federal statute would withstand constitutional challenges in federal court. The U.S. Congress would not have considered whether its federal statute would violate the New Hampshire Constitution.

THE NEW HAMPSHIRE STATUTE GENERALLY COMPLIES WITH FEDERAL CONSTITUTIONAL STANDARDS

19. The United States Supreme Court has not held that the federal constitution requires any specific capital sentencing scheme. The Supreme Court cases after Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976), establish federal constitutional limitations for capital sentencing

procedures but, subject to those minimal standards, do not require any specific capital sentencing procedure.

20. The federal constitutional limitations fall into two categories. As explained recently in Kansas v. Marsh, ___ U.S. ___, 126 S. Ct. 2516, 2524-2525 (2006):

> [The] decisions in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (per curiam), and Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. See id., at 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859.

See generally Blystone v. Pennsylvania, 494 U.S. 299, 308-09 (1990); McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987). Capital sentencing statutes must narrow the class of defendants eligible for the death penalty, see Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980). Capital sentencing statutes must also preserve the right to present mitigating evidence and circumstances of the individual defendant, see Hitchcock v. Dugger, 481 U.S. 393, 394 (sentencer may not refuse to consider or be precluded from considering any mitigating evidence), see also Eddings v. Oklahoma, 455 U.S. 104(1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

21. Since the United States Supreme Court has not required any particular capital sentencing procedure, states have adopted varying procedures for the consideration of aggravating circumstances. Some states have capital sentencing procedures which require a jury to "weigh" aggravating and mitigating circumstances. Some do not require weighing. See generally, Stringer v. Black, 503 U.S. 222, 229-32 (explaining the difference between weighing and non-weighing capital sentencing procedures).

22. With regard to the states which do require weighing of aggravating and mitigating circumstances, the United States Supreme Court has not required any particular method of weighing. The jury "need not be instructed how to weigh any particular fact in the capital sentencing decision." Tuilaepa v. California, 512 U.S. 967, 978-80 (1994). Instead,

> . . . a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. See Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (plurality opinion) (citing Zant v. Stephens, 462 U.S. 862, 875-876, n. 13, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)).

Kansas v. Marsh, supra, 126 S. Ct. at 2524-2525 (2006).

23. In fact, the federal constitution allows states to require imposition of the death penalty unless the defendant proves that mitigating factors outweigh established aggravating factors, Walton v. Arizona, 497 U. S. 639 (1990), overruled on other grounds, Ring v. Arizona, 536 U. S. 584 (2002), and allows mandatory imposition of the death penalty when aggravating factors and mitigating factors are "in equipoise." Kansas v. Marsh, supra, (state "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.").

24. With regard to the Kansas v. Marsh decision, it is worth noting that Justice Souter dissented. In his view,

> A law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd, and the Court's holding that the Constitution tolerates this moral irrationality defies decades of precedent aimed at eliminating freakish capital sentencing in the United States.

Id., at 125 S. Ct. 2444.

25. Thus, under the federal constitution, New Hampshire's procedure for "weighing" of aggravating and mitigating circumstances appears to be constitutional.

THE NEW HAMPSHIRE LEGISLATURE SHOULD HAVE LOOKED TO THE NEW HAMPSHIRE CONSTITUTION RATHER THAN TO FEDERAL LAW

26. The New Hampshire Supreme Court has long emphasized that our state constitution provides greater protections to life and liberty than does the federal constitution.

27. In contrast to the federal Bill of Rights which provides a minimum level of nationwide protection of fundamental rights, State v. Ball, 124 N.H. 226, 231 (1983), our constitution guaranteed the fundamental rights of New Hampshire citizens even before it established the state government. As explained by the New Hampshire Supreme Court:

> We must be ever mindful that the prime obligation of government is to observe those rights embodied in our Bill of Rights which is "a most important part" of our State Constitution. Gould v. Raymond, 59 N.H. 260, 275 (1879) (quoting 9 N.H. STATE PAPERS 881).
>
> Unlike the federal Bill of Rights which, at the insistence of the States, was added after the adoption of the original constitution granting power to the new government, the Bill of Rights in our State Constitution comes first, before any grant of power.
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> > "The reservation precedes the grant. Before they create the power of proportional taxation . . . and the supreme legislative power . . . and before they form themselves into a state . . . they lay the foundation, and therein reserve those personal liberties, which, upon the evidence of history and their own experience, they think cannot safely be surrendered to government." State v. Express Co., 60 N.H. 219, 250 (1880).

State v. Tapply, 124 NH 318, 325 (1983).

28. The protections of individual rights in our state constitution are not mere reflections or derivations of federal constitutional law.

> "Our constitution often will afford greater protection against the action of the State than does the Federal constitution."

State v. Settle, 122 N.H. 214, 217 (1982); State v. Sidebotham, 124 N.H. 682, 686 (1984).

29. For these reasons, when questions of the State's regard for individual rights arise in New Hampshire, the questions are answered first by looking to the New Hampshire Constitution. The most often cited authority for this guiding principle of state constitutional analysis is State v. Ball, 124 N.H. 226 (1983), where the court explained:

> We live under a unique concept of federalism and divided sovereignty between the nation and fifty States. The New Hampshire Constitution is the fundamental charter of our State. The sovereign people gave limited powers to the State government, and the Bill of Rights in part I of the New Hampshire Constitution protects the people from governmental excesses and potential abuses. When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded in the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people.
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> . . . While the role of the Federal Constitution is to provide the minimum level of national protection of fundamental rights, our court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution. State v. Settle, 122 N.H. 214, 217, 447 A.2d 1284, 1285 (1982); State v. Osborne, 119 N.H. 427, 433, 402 A.2d 493, 497 (1979); State v. Hogg, 118 N.H. 262, 264, 385 A.2d 844, 845 (1978).
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> . . . Since this court is the final authority on New Hampshire law, initial resolution of State constitutional claims insures that the party invoking the protections of the New Hampshire Constitution will receive an expeditious and final resolution of those claims. Therefore, we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.

124 N.H. at 231-32. The Court further noted that decisions of the United States Supreme Court may be considered for guidance but those decisions are not binding on the New Hampshire Supreme Court when the court is determining the scope of individual rights under the New Hampshire Constitution. 124 N.H. at 233.

30. Nothing in the United States Constitution prevents a state from providing greater protection of individual rights under its state constitution. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983); State v. Ball, 124 N.H. 226, 232 (1983). See generally William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). In the context of capital sentencing law, this freedom is entirely consistent with the idea of a federal framework of minimal constitutional rights within which a more protective set of state constitutional rights coexists.

31. Although New Hampshire is not unique in finding greater protections under its state constitution, it is worth noting that some states do not give so much weight to their constitutions. Three general types of state constitutional analysis are found. Following the "lock-step" approach, some states merely interpret their state constitutions to provide individual rights which are co-extensive with the minimal federal constitutional rights. Other states follow a middle ground or "interstitial approach" in which the state assumes that state and federal constitutional rights have the same scope, but will deviate from that for a strong and specific reason. The New Hampshire Supreme Court follows neither of those approaches. New Hampshire follows the "primacy" model of state constitutional analysis. As described in State v. Ball, assuming there is no question of preservation of the issue, the state constitution is consulted first and independently. Individual rights under the state constitution are not assumed to be the same as under federal law. Federal constitutional law is consulted only in the last instance. See generally Williams, "For a More Vigorous State Constitutionalism," 10 Roger Williams U. L. Rev. 621 (2005) (focusing on the interstitial and primacy approaches); Galie, "State Supreme Courts, Judicial Federalism and the Other Constitutions," 71 Judicature 100 (1987); "Developments in the Law: The Interpretation of

State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982)(cited in State v. Tapply, 124 N.H. at 321); "The Primacy Method of State Constitutional Decision-Making: Interpreting the Maine Constitution," 38 Me. L. Rev.491 (1986).

32. State v. Ball and the New Hampshire Supreme Court's analysis of individual rights under the New Hampshire Constitution have had a great impact on the criminal justice system in New Hampshire. Our Supreme Court has often found that individual rights in regard to police searches and seizures are more protected under the New Hampshire Constitution than the federal constitution. See, e.g., State v. Canelo, 139 N.H. 376 (1995)(no good faith exception to warrant requirement); State v. Sterndale, 139 N.H. 445 (1995)(no automobile exception); State v. Gravel, 135 N.H. 172 (1991) (evidence obtained in violation of Miranda may not be used to obtain search warrant); State v. Settle, 122 N.H. 214 (1982)(expanded standing). The court has also found greater protection in other areas. Our Court rejected Moran v. Burbine, 475 U.S. 412, 422 (1986), holding that our constitution requires police who are undertaking a custodial interrogation to inform a suspect if an attorney retained on his or her behalf is attempting to make contact with him. State v. Roache, 148 N.H. 45 (2002). The court has also held that a New Hampshire defendant's right to "all proofs favorable" provides more protection against non-disclosure by the prosecution than analogous federal standards. State v. Laurie, 139 N.H. 325 (1995). Most importantly, as set forth below, our court has often found that our state constitution provides greater protection of individual rights where due process and burdens of proof are concerned.

33. Considering the primary and greater protections of the New Hampshire Constitution, it is clear that a capital sentencing scheme which only takes into account the minimal

requirements of the federal constitution risks failing to withstand scrutiny under the New Hampshire Constitution.

THE DEATH PENALTY, THE NEW HAMPSHIRE CONSTITUTION AND BURDENS OF PROOF

34. Part 1, article 15 of the New Hampshire Constitution states that "No subject shall be . . . deprived of his life [or] liberty . . . but by the judgment of his peers, or the law of the land . . . ." The New Hampshire Supreme Court has long read this provision to be synonymous with a guarantee of "due process." See Bragg v. Director, 141 N.H. 677 (1997); Petition of Bagley, 128 N.H. 275, 282 (1986).

35. This Court should recognize that the due process guarantee of the New Hampshire Constitution requires proof beyond a reasonable doubt that aggravating factors outweigh mitigating factors before any New Hampshire death sentence is imposed.

36. A lower standard would present too great a risk of executing a person who does not deserve to die and would fail to engender public respect for the gravity and importance of capital case sentencing proceedings. The Court should recognize this aspect of due process because (1) federal burdens of proof have often failed to satisfy the requirements of due process under part 1, article 15 of the New Hampshire Constitution; (2) the New Hampshire Constitution expressly treats capital punishment differently than the federal constitution; and, (3) a due process analysis in accordance with New Hampshire Supreme Court jurisprudence demonstrates that the beyond a reasonable doubt standard should apply to decisions with regard to whether a person is sentenced to death.

Federal Burdens of Proof Often Fail to Satisfy the Demands of Due Process Under the Part 1, Article 15

37. The protections of the New Hampshire Constitution in regard to due process and burdens of proof are often broader than analogous federal constitutional standards. For example, under minimal federal constitutional standards, when the State seeks to introduce evidence of a confession by an accused person, it is sufficient for the State to prove by a preponderance of the evidence that the confession was voluntary. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972). The New Hampshire Supreme Court expressly rejected this burden of proof as insufficient. In New Hampshire our law recognizes that "[t]he stakes are too high and the risk of error too great to permit a determination of admissibility to be decided by a balance of probabilities." State v. Phinney, 117 N.H. 145, 147 (1977).[1] Phinney went on to hold that the voluntariness of a confession must be proved beyond a reasonable doubt. In State v. Gullick, 118 N.H. 912 (1978), the Court extended its rule to require that the validity of a waiver of Miranda rights also be proved beyond a reasonable doubt. Surely the stakes are just as high and the risk of error just as great in a capital case sentencing hearing.

38. State v. Laurie, 139 N.H. 325 (1995) also rejected a federal burden of proof because it failed to satisfy the requirements of due process in New Hampshire. Laurie involved the discovery after trial of the State's failure to disclose exculpatory evidence. The defendant sought to set his conviction aside and have a new trial. Under minimal federal constitutional standards, his burden would have been to establish a reasonable probability that the verdict would have been different if the non-disclosed evidence had been available. The New Hampshire Supreme

[1]Phinney did not expressly state that it was based on principles of due process but soon after the decision the Court began treating it as a matter of due process. See e.g. Proctor v. Butler, 117 N.H. 927, 932 (1977).

Court held that the federal standard does not give a defendant the protection to which he is entitled as a matter of due process in New Hampshire. The Court held that when favorable exculpatory evidence is not disclosed by the State, the burden is on the State to prove beyond a reasonable doubt that the non-disclosure did not contribute to the jury's guilty verdict. 139 N.H. at 330.

39. Prior to a constitutional amendment of part 1, article 15, the New Hampshire Supreme Court interpreted the due process of guarantees of that provision to require proof beyond a reasonable doubt of the dangerousness of a person acquitted due to insanity before the person could be committed to a mental institution. Opinion of the Justices, 122 N.H. 115 (1982); Novosel v. Helgemoe, 118 N.H. 115 (1978). In the related context of civil commitment proceedings, the Court stated that the choice of a burden of proof reflects "the comparative social costs of erroneous determinations" and that proof beyond a reasonable doubt is required when it is necessary to take the "utmost care" in making a determination. Proctor v. Butler, 117 N.H. 927, 932 (1977); In re Sanborn, 130 N.H. 430, 442 (1988)(overruling Proctor in light of the 1984 constitutional amendment). Attempts by the legislature to modify this burden of proof by statute were rejected by the New Hampshire Supreme Court. Opinion of the Justices, 122 N.H. 115 (1982). It took a special amendment to part 1, article 15 of the New Hampshire Constitution to exempt this specific area of law from the rigors of due process which were otherwise applicable. See In re Sanborn, 130 N.H. 430 (1988). Compare Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043 (1983); Addington v. Texas, 441 U.S. 418 (1979).

40. Specifically with regard to sentencing, the New Hampshire Supreme Court has held that "the Due Process Clause of the New Hampshire Constitution requires proof beyond a reasonable doubt of prior convictions used to enhance a defendant's sentence to life without parole under

the provisions of RSA 632-A:10-a, III." State v. McLellan, 146 N.H. 108, 115 (2001) (discussed at length below). In doing so, our Court noted that the United States Supreme Court had previously declined to rule on whether such protections are required. See Almendarez-Torres v. United States, 523 U.S. 224, 248 (1998); see also Apprendi v. New Jersey, 530 U.S. 466 (2000).

41. Thus, our Supreme Court has a history of requiring a beyond a reasonable doubt standard when the issue is important and the stakes for the criminal defendant are high.

The New Hampshire Constitution Treats Capital Punishment Differently

42. The New Hampshire Constitution contains a pronouncement that the "true design of all punishments [is] to reform, not to exterminate mankind," part 1, article 18, a requirement that "[a]ll penalties ought to be proportioned to the nature of the offense," part 1, article 18, and a prohibition against either cruel or unusual punishments, part 1, article 33. This express language in our constitution goes beyond the Eighth Amendment's prohibition against punishments that are cruel and unusual. See Accompanying Motion To Bar The Death Penalty (No. 1).

43. Regardless of whether these constitutional provisions create independent and broader protections than the Eighth Amendment, the express language in our constitution confirms that special care should be taken in capital cases. That special care should include a requirement that the State's case is judged according to the highest standards.

Due Process Analysis

44. Our Supreme Court has set forth a particular method of analysis for due process claims regarding burdens of proof.

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

State v. Lavoie, ___ N.H. ___ (2007).

45. When "determining whether a statutory burden of proof satisfies the due process requirement" the first question is "whether the challenged procedure concerns a constitutionally protected interest," and if so, the second question is "whether procedure at issue affords the requisite safeguards." In re Tracy M., 137 N.H. 119, 122 (1993); see also, State v. McLellan, supra; Bragg v. Director, 141 N.H. 677 (1997); State v. Haley, 141 N.H. 540 (1997).

46. The answer to the first question is obvious: the right to life is a constitutionally protected interest. Part 1, article 15 of the New Hampshire Constitution explicitly protects the right to life. The death penalty is the most severe penalty available in a criminal case. State v. McClellan, supra, 146 N.H. at 114.

47. In answering the second question and determining whether the constitutional interest is adequately protected, the New Hampshire Supreme Court has stated that it considers the following factors:

> (1) the private interest affected by the official action;
>
> (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and

> (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

State v. Lavoie, ___ N.H. ___ (2007); State v. McLellan, 146 N.H. 108, 115 (2001); State v. Haley, 141 N.H. 541, 544 (1977); In re Tracy M., 137 N.H. 119, 123 (1993); Petition of Bagley, 128 N.H. 275, 282 (1986).

48. As for the first factor, the private interest affected by official action is the right of a person to life, an interest that simply could not be greater. In State v. McLellan, supra, the Court found that the risk of life imprisonment required proof of prior convictions beyond a reasonable doubt (while acknowledging the death penalty posed an even greater private interest than the risk of life imprisonment). Compare State v. Lavoie, supra (risk of temporary incarceration for evaluation). On the lone occasion that the New Hampshire Supreme Court has considered an issue of capital sentencing procedure, the Court commented, "When a defendant's life is measured as an appropriate punishment, a court must be particularly sensitive to insure that every safeguard is observed." State v. Johnson, 134 N.H. 570, 576-77 (1991).

49. Regarding the second factor, the question of whether a human being should be deliberately killed is so difficult that there is always a concern that the decision might be wrong. Once carried out, the decision can never be corrected. The interest in making a correct decision is paramount because, unlike any other decision, the decision to execute someone cannot be reversed or compensated for once it is carried out. In short, there is not only a great risk of error, but a great risk of making an error that can never be corrected. Moreover, the value of additional safeguards is plain. Telling a jury that it must be certain beyond a reasonable doubt of its decision will insure that jurors will not impose the death penalty if they have any reasonable doubts. By comparison, telling jurors they may impose death if the aggravating facts

"sufficiently outweigh" mitigating facts leaves jurors with no guidance. Indeed, a juror could vote for death under this standard if the juror thought the death penalty was "probably" justified.

50. The third factor must also be held against the State since it cannot show a significant interest in following an alternative, more careful procedure. Certainly the State has no interest in executing a person as to whom there is a reasonable doubt of whether the death penalty should be imposed. Rather, the government and the public have an interest in the legitimacy of the criminal justice system which is threatened by the prospect of executing someone who does not deserve to die. Nor can the government claim that jurors will be confused if they are required to find that the death penalty is justified beyond a reasonable doubt before they impose that ultimate penalty. The instruction on this point will be no more difficult to understand than the usual Wentworth instruction on reasonable doubt.

51. Thus, decisions in analogous contexts, the text of our constitution and the prescribed method of constitutional analysis all demonstrate that a valid New Hampshire capital sentencing statute must require proof beyond a reasonable that aggravating factors outweigh mitigating factors and a finding beyond a reasonable doubt that the defendant deserves to die. Since our capital sentencing statute does not provide these protections, the death penalty should be barred in this case.

THE COUNTER-ARGUMENT THAT THE DEATH PENALTY DETERMINATION IS NOT A FACTUAL ISSUE TO WHICH A BURDEN OF PROOF MIGHT APPLY

52. The State may argue that it is inappropriate to require proof beyond a reasonable doubt when the question is balancing aggravating and mitigating factors or of determining whether a

person deserves to live or die.[2] In other words, the State would argue that any burden of proof is inappropriate because there is no "fact" being proved. Rather, the issues of weighing factors and deciding whether the death penalty is deserved are qualitative matters than can never be proved in the way that a fact, such as that the accused committed a certain act, can be proved.

53. Such an argument would ignore everyday events in criminal trial courts in New Hampshire. Under New Hampshire law, jurors are instructed to apply burdens of proof to such "non-factual issues." When a competing harms defense applies, jurors are expressly instructed to "weigh" the necessity of a defendant's conduct against the harm sought to be prevented by the law. In purely logical terms, such a weighing of harms cannot be distinguished from a weighing of aggravating factors against mitigating factors. See RSA 627:3. Similarly, jurors are regularly told in self-defense cases that they must consider whether the State has proved beyond a reasonable doubt that an accused did not have a reasonable belief sufficient to justify his assaultive behavior. See RSA 627:4. Determining whether certain conduct is established beyond a reasonable doubt to be unreasonable is at least as much of a non-factual determination as determining whether a defendant in a capital case should die.

54. New Hampshire courts also apply the beyond a reasonable doubt standard to just this kind of "non-factual" issue. As noted above, State v. Laurie requires a Court to consider whether the State has proved beyond a reasonable doubt that the non-disclosure exculpatory evidence did not affect a jury verdict. That is not a determination of objective or quantitative fact; it is a

[2] There are states which have expressly rejected the beyond a reasonable doubt standard for death penalty determinations. Most of these decisions are based on the argument that whether the death penalty is the right punishment is not a "factual" determination and therefore not susceptible of "proof beyond a reasonable doubt." See, e.g., Whisenhant v. State, 482 So. 2d 1225, 1235 (Ala. Crim. App. 1982), aff'd, 482 So. 2d 1241, 1245 (Ala. 1983); People v. Rodriguez, 42 Cal. 3d 730, 779, 726 P. 2d 113, 144 (1986); State v. Sivak, 105 Idaho 900, 905, 674 P. 2d 396, 401 (1983); Moore v. State, 479 N.E. 2d 1264, 1281 (Ind. 1984); State v. Bolder, 635 S.W. 2d 673, 684 (Mo. 1982).

determination that is necessarily speculative and qualitative, akin in form though less important than the determination of whether a person lives or dies. Likewise, the New Hampshire Supreme Court applies the beyond a reasonable doubt standard to other determinations which are not purely factual or objective. When a defendant is able to demonstrate that the exclusion of evidence was error in his trial resulting in his conviction, the New Hampshire Supreme Court requires the State to demonstrate that the error was harmless beyond a reasonable doubt before it will sustain the conviction. State v. Woodard, 121 N.H. 970, 975 (1981). In cases of prosecutorial overreaching and the erroneous admission of evidence, the State must also prove beyond a reasonable doubt that the error did not affect the verdict. See, e.g., State v. Skidmore, 138 N.H. 201, 203 (1993); State v. Bujnowski, 130 N.H. 1, 6 (1987).

55. Moreover, such an argument by the State would ignore the presumably reasonable decisions of other state courts and legislatures. A number of states have determined that the federal minimal standards are inadequate and have chosen to structure their sentencing hearings differently. Either through legislative or judicial determinations, these states require that imposition of the death penalty must be justified beyond a reasonable doubt. Statutes in some jurisdictions expressly require the prosecution to prove the controlling sentencing issues beyond a reasonable doubt before a verdict imposing death may be returned. Ark. Stat. Ann. sec. 5-4-603(a), 5-4-603(c); N.J. Stat. Ann. sec. 2C:11-3(f)(3)(a)(West Supp. 1993); Ohio Rev. Code Ann. sec 2929.03(D)(2); Tenn. Code Ann. sec. 39-13-204(g)(1); Utah Code Ann. 76-3-207(5)(b); Wash. Rev. Code Ann. sec. 10.95.060(4).

56. At least three state supreme courts have judicially imposed a beyond a reasonable doubt requirement for the death penalty determination. State v. Biegenwald, 106 N.J. 13, 524 A. 2d 130 (1987)(prior to the enactment of New Jersey's statutory requirement); State v. Arguelles, 63

P. 3d 731, 754 (2003); State v. Holland, 777 P. 2d 1019 (Utah 1989); People v. Dunlop, 975 P. 2d 723, 736 (1999); People v. Tenneson, 788 P. 2d 786 (Colo. 1990).

57. The situation in Arkansas is instructive. The Arkansas statute explicitly adopts the beyond a reasonable doubt standard at every critical stage of the jury's deliberations. A capital sentencing jury in Arkansas may only impose the death penalty if it unanimously returns written findings that:

> Aggravating circumstances exist beyond a reasonable doubt; and
>
> Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
>
> Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

Ark. Stat. Ann. sec 5-4-603(a), 5-4-603)(c). At the very least, the Arkansas law demonstrates that the beyond a reasonable doubt standard is workable in capital cases and does not inappropriately interfere with the State's goal of executing defendants.

CONCLUSION

For all the foregoing reasons, therefore, the death penalty may not be imposed in this case.

WHEREFORE the defense prays for:

I. A hearing on this motion;

II. An order from the Court declaring the New Hampshire capital sentencing statute, RSA 630:5, unconstitutional in violation of the New Hampshire Constitution, part 1, articles 15, 18 and 33; and

III. An order from the Court precluding the imposition of the death penalty in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 14th day of June, 2007, to the Office of the Attorney General.

Richard Guerriero, Public Defender